1955

*Oct. 20
*Nov. 23

CHOW BEW .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal Law—Murder—Death resulting from robbery by violence at hands of accused or an accomplice—Whether proof of intent to kill necessary—Criminal Code, ss. 69 (2), 260 (a), (c).

The appellant charged with three others of murder, tried separately and convicted, appealed on the ground among others that the jury as charged could reasonably have believed that it was entitled to convict of murder under s. 260 (*a*) or (*c*) of the *Criminal Code* without proof of intent to kill and apart from s. 69 (2).

Held: 1. That upon a charge of murder based on s. 260 (*a*) or (*c*) proof of intent to kill is not necessary, nor is it when s. 69 (2) is invoked.

2. (Cartwright J. dissenting): That the charge upon this aspect of the matter was sufficient.

3. (By Kerwin C.J. and Taschereau, Locke and Fauteux JJ.): That it was not necessary that the jury be charged as to the defence of manslaughter since there was no evidence upon which such a defence could be based.

Per Taschereau, Locke and Fauteux JJ.: There was evidence from which the jury might properly infer that the appellant and his companion meant to inflict grievous bodily injury to the deceased and had aided and abetted each other in doing so for the purpose of facilitating the commission of robbery and that death had ensued. Such an offence is murder as defined by s. 260 whether they or either of them meant or knew that death was likely to ensue. In such circumstances it would be a matter of indifference which inflicted the fatal injury since each was liable for the other's act. The appellant might also be found guilty of murder if the jury inferred that a common intention had been formed by the appellant and his associates to rob the deceased and to assist each other in doing so and that the killing was an offence which ought to have been known to the appellant to be a probable consequence of such common purpose.

Per Cartwright J. (dissenting): The jury should have been instructed, that if they concluded from the evidence that the violence was inflicted by the appellant's companion alone, they could find the appellant guilty only if they were satisfied beyond a reasonable doubt: (i) that it was in fact a probable consequence of the prosecution of the common purpose of the appellant and his accomplice to rob the deceased that the accomplice, for the purpose of facilitating the robbery, would intentionally inflict grievous bodily injury on the deceased or would wilfully stop his breath, and (ii) that it was known or ought to have

*PRESENT: Kerwin C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

**Mr. Justice Estey, because of illness, took no part in the judgment.

been known to the appellant that such consequence was probable. While on the evidence it was open to a properly instructed jury to so find, the jury was not adequately instructed on this vital matter.

Judgment of the Court of Appeal for British Columbia (1955) 112 Can. C. C. 180, affirmed.

APPEAL from a judgment of the Court of Appeal for British Columbia (1) affirming, the appellant's conviction for murder. O'Halloran J.A. dissenting, would have set aside the murder conviction, substituted a verdict of manslaughter and imposed a sentence of ten years imprisonment.

In separate trials one of the other three was convicted of murder, one acquitted and the Crown did not proceed against the third.

F. G. P. Lewis for the accused, appellant.

L. H. Jackson and *W. G. Burke-Robertson, Q.C.* for the respondent.

THE CHIEF JUSTICE:—This appeal is based upon five grounds of dissent taken by Mr. Justice O'Halloran in the Court of Appeal for British Columbia (2). As to numbers two, three and five, I am of opinion that the charge of the trial judge is not open to the objections raised. These are as follows:—

(2) Upon the charge as given them the jury could reasonably believe they were entitled to convict of murder under *Code* s. 260(*a*) and (*c*) without proof of intent to kill and apart from *Code* s. 69(2).

(3) The jury were not instructed that proof of intent to kill was essential under *Code* s. 69(2) upon the evidence before them, in order to convict of murder.

(5) The instructions upon reasonable doubt did not bring home to the jury the distinction between the proof required in a criminal case of murder vis-à-vis manslaughter contrasted with that required in a civil case.

Numbers one and four may be considered together:—

(1) The Learned Judge omitted to put the defence of manslaughter adequately before the Jury and nowhere in the charge was the defence of manslaughter put in such a way that the Jury would realize that manslaughter vis-à-vis murder was the transcendent issue for them to decide.

(4) No mention of manslaughter was found at pages 189, 193, 195 and 197 in the Charge to the Jury where in eleven places it ought to have appeared with murder and acquittal as a verdict open to the jury.

(1) (1955) Can. C.C. 180. (2) (1955) 112 Can. C.C. 180.

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Kerwin C.J.

After a careful reading of the charge I am of opinion that the trial judge unequivocally directed the jury as to returning a verdict of manslaughter if they were not satisfied beyond a reasonable doubt that murder had been proved; but, in any event, there was no evidence in this case upon which any verdict of manslaughter could be based.

The appeal must be dismissed.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by:—

LOCKE J.:—The second and third grounds of dissent upon which this appeal has been taken imply that, in a charge of murder based on s. 260(*a*) or s. 260(*c*) of the *Code*, proof of intent to kill is necessary and that this is also so when s. 69(2) is invoked. I am unable, with respect, to agree with these conclusions in view of the terms of the sections mentioned.

S. 259 defines some of the circumstances in which culpable homicide is murder in law, and certain others are defined in s. 260. As declared by s-s. (*a*) of the latter section, if a person means to inflict grievous bodily injury for the purpose of facilitating the commission of the offences, *inter alia*, of robbery or burglary and death ensues from such injury, the offence is murder, whether the offender means or not death to ensue or knows or not that death is likely to ensue. S-s. (*c*) provides that if a person by any means stops the breath of any person for any such purpose and death ensues from such stopping of the breath, the offence is murder.

The first sentence of s. 69 provides, *inter alia*, that every one is a party to and guilty of an offence who actually commits it, or does or omits an act for the purpose of aiding any person to commit the offence, or abets any person in committing it. This section appeared as s. 61 when the *Code* was first enacted in 1892.

As it affects the present case, the matter is thus stated in the 10th Edition of *Russell on Crime*, at p. 1853, as follows:—

> Thus where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and while acting together in that common object, a fatal blow is given, it is immaterial

which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow.

There was evidence in the present matter from which a jury might properly draw the inference that the appellant and Cathro had meant to inflict grievous bodily injury to Ah Wing and had aided and abetted each other in doing so for the purpose of facilitating the commission of the offence of robbery and that his death had resulted. If the jury chose to draw this inference, the offence was murder as defined by s. 260, whether they or either of them meant that death should ensue or knew that death was likely to ensue. In such circumstances, it would be a matter of indifference which of the two struck the fatal blow or inflicted the fatal injury, since each would be liable in law for the act of the other.

The appellant might also have been found guilty of murder, if the jury were to draw the inference that a common intention to rob Ah Wing had been formed by the appellant and his associates and to assist each other in doing so, and that the killing was an offence which ought to have been known to the appellant to be a probable consequence of the prosecution of such common purpose. The charge upon this aspect of the matter appears to me to have been sufficient.

As to the objections to the charge on the ground that what has been referred to as the defence of manslaughter was not put to the jury properly, I think nothing in the evidence raised any such issue and, accordingly, this criticism of the charge is not justified. In my opinion, upon the evidence only two verdicts were possible, that is, guilty or not guilty. I cannot think that it affected the appellant's position to his detriment that the jury were told, as they were, that they might find manslaughter.

I would dismiss the appeal.

RAND J.:—The evidence in this case, differing in this respect from that adduced in the trial of the accomplice, Cathro, whose conviction of murder has likewise been brought in appeal before us, did not go directly to what had taken place in the store resulting in the death. The facts before the jury were these: about 10:30 p.m. from his home a witness saw an automobile, draw up right opposite him

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on 24th Avenue on which a lane opened leading to the rear of the store of the deceased; a man was sitting slouched in the driver's seat, and the engine was running which upon the witness's coming out of the house was shut off; about this time Cathro was seen in the store drinking from a bottle by three other witnesses also inside; before the latter went out the accused entered and he and Cathro were left alone with the deceased on their departure; the lights of the store were noticed to be out earlier than usual; within ten or fifteen minutes from the time the car was observed by him, the first witness who had returned from a short errand in his car noticed two persons, one of them carrying a small box, running westerly along the avenue from the direction of the store to the parked automobile which they hurriedly got into and drove away at high speed; the witness, who had previously recognized the make of car, followed them and was able to obtain the license number; upon returning from this pursuit, he found the police in the store to whom he gave a description of the car, including its number; the police had been called in by a neighbour of the deceased upon hearing moaning within the store; a general alert was sent out at about 10:58 o'clock the police came upon the car with four occupants, the accused and Cathro being in the back seat with the former holding a small box containing about $50 and a receipt shown to have been given to the deceased. The cause of death was the force which not only had broken the walls of the larynx but by shutting off respiration had brought about asphyxia. On these primary facts the jury could admittedly have found the death to have been brought about in the course of robbery by acts of force to which both men were party: as is seen, there is nothing whatever on which a distinction could be made by the jury between the parts played by Cathro and the accused, the vital circumstances in which the evidence differs from the case of Cathro.

In that situation must a trial judge, in his charge, embark upon a speculation of the many possible modes in which the fatal occurrence might have taken place? Without more, it would, I think, be improper for him to invite the jury to indulge in any such imaginings. What they must do is to draw their conclusions from the evidence submitted to them or the reasonable inferences arising from it; but on any feature on which the evidence, including in that the

inferences to be drawn from the total circumstances disclosed, is silent, in general and specifically here no special direction is warranted.

A number of grounds were urged against the charge, but I find myself quite unable to say that as a whole it did not present the law and the case for the defence to the jury both fairly and adequately.

I would dismiss the appeal.

CARTWRIGHT J. (dissenting):—The appellant was tried before Manson J. and a jury at the Vancouver assize and on March 30, 1955, was convicted on the charge, "that he, the said Chow Bew at the City of Vancouver, in the County of Vancouver, in the Province of British Columbia, on the 6th day of January, 1955, together with Donald Keith Cathro, Eng Git Lee and Richard Wong, unlawfully did murder Young Gai Wah, otherwise known as Ah Wing."

His appeal to the Court of Appeal for British Columbia was dismissed. O'Halloran J.A., dissenting, would have allowed the appeal, quashed the conviction and substituted a verdict of manslaughter and a sentence of ten years imprisonment.

The following statement of the facts is taken from the reasons for judgment of Bird J.A.:—

> The case for the Crown rests upon the evidence of various persons who between approximately 10.30 and 11.00 p.m. on the night in question were either present in the store where the killing occurred or in its near vicinity; as well as that of police officers who investigated the circumstances surrounding the crime and of the physician who conducted the autopsy on the body of the deceased man.
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> The facts now set out emerge from the uncontradicted testimony of these persons called as Crown witnesses:
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> (1) The store is situate at 4017 MacDonald Street from the rear of which a passage leads to the 2800 block on West 24th Avenue, Vancouver, B.C.
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> (2) At 10.30 p.m. January 6, 1955, Dickinson saw a car stop in the 2800 block W. 24th Avenue, from which two persons alighted and walked away in the general direction of the store. He said that the car, in which was one occupant, remained there with lights out.
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> (3) About 10.40 p.m. the deceased man served in the store the witness Cowie, who, with his wife, occupied the premises adjoining the store to the north, as well as Shearer and Wood. Cathro was then observed in the store by Cowie, Shearer and Wood, and the appellant was seen entering by Shearer when the latter left the premises.
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> (4) At 10.50 p.m. a groan from the store premises was heard by Cowie and his wife who then observed that the interior lights of the store were out. She called the police immediately by telephone.

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(5) About 10.45 p.m. Dickinson returned by car to his home in the 2800 block 24th Avenue West and soon after, in company with Scholes, saw two men, one of whom carried what looked like a cigar box, run west on 24th Avenue from the direction of MacDonald Street, and enter the parked car which then rapidly drove east without lights.

(6) Dickinson followed the eastbound car for two miles, observed that it was a Pontiac and noted its licence number which information soon after was reported by him to police officers whom he found near the store premises on his return.

(7) Shearer and Wood, who stood talking outside the store after leaving it, did not observe anyone enter or leave the premises before police cars arrived at 10.50 p.m. Meantime they had observed the store lights go out.

(8) Upon examination of the store premises made by police officers about 10.50 p.m. the front door was found locked, the rear door leading to the passage to 24th Avenue was open. The lights had been shut off from the fuse box and the dead body of Ah Wing was found within the premises.

(9) A Pontiac car bearing the licence number given to the police officers by Dickinson was stopped by a constable on a downtown street some miles from the store premises at 10.58 p.m. In the car were the four men charged in the indictment. The appellant then had in his possession a cigar box containing money, as well as a receipt which was shown to have been issued to the deceased man.

The facts thus elicited from the various Crown witnesses and particularly the fact that only Cathro, the appellant, and Ah Wing were present in the store between 10.40 and 10.50 p.m. do not appear to have been seriously questioned by defence counsel at the trial.

T. R. Harmon, a qualified physician and surgeon, retained as pathologist and autopsist by the City of Vancouver, expressed the opinion, founded upon his examination of the body of the deceased made January 7, 1955, that the latter had come to an "unnatural death from asphyxia due to strangulation with a fracture of the voice box". It was his belief that "death resulted from strangulation by pressure that shut off the breathing," that "very great pressure was required to fracture the voice box". The application of "a knee on the neck was the most likely cause of injury, very powerful hands could do it" but they would leave marks on the neck of which the witness found none. He said further that the identical type of injury to the voice box is not usual and he could not recall having seen another. There were superficial injuries to the face; left wrist, and scalp, none of which in the witness' opinion were likely to have caused death, though the injuries to the head may have caused loss of consciousness.

There was no direct evidence of what transpired in the store premises subsequent to 10.40 p.m. when Cathro, the appellant, and Ah Wing, were shown to have been the only occupants.

The appellant did not take the witness-box nor did the defence adduce evidence.

It may be added, as is pointed out by O'Halloran J.A., that there was no evidence that any weapon was in the possession of the appellant or of any of the other three named in the indictment or played any part in causing the death of Ah Wing.

It is apparent from this summary of the evidence that it was open to the jury to find that the appellant and Cathro had formed a common intention to rob Ah Wing and to assist each other in so doing, that Ah Wing came to his death as the result of an assault committed for the purpose of facilitating the carrying out of the robbery, that the force used was so great as to indicate that the person who applied it meant to inflict grievous bodily harm on Ah Wing or to stop his breath or to do both. It is, I think, also apparent that it was open to the jury to find that the evidence was not inconsistent with the view that the force which caused the death of Ah Wing was applied by one only of the two who were together committing the robbery and that it was impossible to say which one actually committed the assault. It therefore became of crucial importance that the learned trial judge should make plain to the jury the law by which they should be guided if they took the view of the evidence that all the injuries from which the death of Ah Wing ensued were inflicted by Cathro alone.

From the description of the injuries given by Dr. Harmon there could be little doubt that the individual who actually applied the force was guilty of murder under the provisions of either clause (*a*) or clause (*c*) of s. 260 of the *Criminal Code,* in force at the date of the offence and at the date of the trial. It would seem that such individual meant, for the purpose of facilitating the commission of the robbery, to inflict grievous bodily injury or, as an alternative to the intention just mentioned or in addition thereto, meant to stop the breath of Ah Wing. The question is how the jury should have been instructed as to what they must find before they could properly convict of murder the other individual taking part in the robbery on the assumption that he did not personally use any force from which the death of Ah Wing ensued.

In my view the law of Canada on this point is to be found in ss. 259, 260 and 69 of the *Criminal Code* and differs from the law of England as laid down in the cases of *Rex* v. *Betts and Ridley* (1) and *Rex* v. *Grant and Gilbert* (2).

Applying the relevant sections of the *Code* to the state of facts mentioned, I am of opinion that it should have been

(1) (1930) 22 Cr. App. R. 148. (2) (1954) 38 Cr. App. R. 107.

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made plain to the jury that, if, in their view, the circumstances proved were not inconsistent with the view that the violence inflicted on Ah Wing was inflicted by Cathro alone, they could find the appellant guilty of murder only if they were satisfied beyond a reasonable doubt of two things, (i) that it was in fact a probable consequence of the prosecution of the common purpose of the appellant and Cathro to rob Ah Wing, that Cathro, for the purpose of facilitating the commission of the robbery, would intentionally inflict grievous bodily injury on Ah Wing or would wilfully stop his breath, and (ii) that it was known or ought to have been known to the appellant that such consequence was probable. While in my view, on the evidence, it would have been open to a properly instructed jury to so find, I am in agreement with O'Halloran J.A. that the jury were not accurately instructed on this vital matter.

The learned trial judge having told the jury that in ss. 259 and 260 the word "offender" extended to all who were involved and that the singular included the plural if the evidence so required, went on to say in dealing with these two sections:—

> If you are of the opinion beyond a reasonable doubt that the Accused did intend to inflict grievous bodily harm, for the purpose of facilitating—when I say the Accused, I think I might well join with it the Accused *or his companion* or the two of them together—if you are of the opinion beyond a reasonable doubt that the accused did intend to inflict grievous bodily injury for the purpose of facilitating the commission of the robbery, then the earlier words of Section 260 come into play and the crime is that of murder, regardless of whether the offender meant or not death to ensue, or whether he knew or not that death was likely to ensue.

and a little later continued:—

> It seems to me—and the finding of fact is for you—that the acts of the offenders were for the purpose of facilitating the commission of the robbery, as it seems to me that the offenders wilfully stopped the breath of the deceased to facilitate the commission of the crime of robbery and death ensued. And if I am right in my view that that word "offender" as used in that section extended to the plural, then you at once arrive at the position that it is quite immaterial which of these two men that were in the premises, seemingly, stopped the breath of the Accused (sic—obviously the word "accused" should be "deceased") and it is immaterial whether they meant to cause death or not, or knew or not that death was likely to ensue, if they stopped the breath and death did ensue.
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> I now leave those sections and turn to Section 69 of the *Code* . . .

It appears to me that the jury may well have understood from the passages which I have quoted, and in the first of which I have italicized some words, that it was open to

them to find a verdict of guilty against the appellant, even if in their opinion he had not personally used any force to Ah Wing, by the application of the terms of ss. 259 and 260 and without the necessity of considering or applying the terms of s. 69 (2); and I think that this was a fatal error. If I am right in my view as to the existence of this error, it is obvious that it could not be cured merely by an accurate direction, as to the effect of s. 69 (2), for, *ex hypothesi,* the jury might feel no need to consider that section at all; and I can find nothing in the remainder of the charge which has the effect of correcting or removing such error. I conclude therefore that the verdict cannot stand.

The ground of misdirection on which I have concluded that the appeal should be allowed appears to me to be sufficiently raised in the second ground of dissent of O'Halloran J.A. set out in the formal order of the Court of Appeal as follows:—

> Upon the charge as given them the jury could reasonably believe they were entitled to convict of murder under *Code* s. 260 (*a*) and (*c*) without proof of intent to kill and apart from *Code* s. 69 (2).

While I trust that it so appears from all that I have said above, I wish, so as to avoid the possibility of misunderstanding, to say explicitly that I do not agree with the view, implied in the wording of the ground of dissent just quoted, that in order to enable a properly instructed jury to convict of murder in this case proof of intent to kill was necessary. My view as to the misdirection which I regard as fatal would be correctly summarized as follows:—

> Upon the charge as given them the jury could reasonably believe they were entitled to convict of murder under *Code* s. 260 (*a*) and (*c*) apart from *Code* s. 69 (2).

As already indicated this ground is, I think, included in the ground of dissent which I have quoted. The greater includes the less.

It does not appear to me that this is a case in which the provisions of 1014 (2) can be applied. I have already indicated my view that the evidence was sufficient to permit a properly instructed jury to convict of murder but I do not think it can safely be affirmed that they must necessarily have done so.

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I would allow the appeal, quash the conviction and direct a new trial.

Appeal dismissed.

Solicitor for the accused (appellant): *F. G. P. Lewis.*

Solicitor for the Crown, respondent: *L. H. Jackson.*